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Jurors' and Judges' Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom

Clare S Allely and Penny Cooper*

Concern has been highlighted in the literature regarding how juries and judges handle cases which involve a defendant with autism spectrum disorder (ASD). The relatively little research on judicial perceptions or decision-making regarding individuals with ASD indicates that judges have limited understanding and familiarity with high-functioning ASD (hfASD) and ASD. The present systematic review will identify studies which investigate jurors' (eg using mock jurors) and/or judges' evaluations of defendants with ASD and studies which investigate whether the defendant diagnosis of ASD impacts on sentencing. Only four studies were identified which investigated jurors' and/or judges' evaluations of a defendant with an ASD or investigated whether the defendant diagnosis of ASD impacts on sentencing. Further research is recommended which should include an evaluation of cases involving a defendant with an hfASD or ASD diagnosis comparing charges, pleas entered, procedural adjustments at court, evidence adduced about the defendant's condition, directions to juries, judicial remarks on the evidence (eg summing-up for the jury), verdicts and sentencing. This would enable the assessment of the specific offending behaviour and disorder of the defendant, and how these may be relevant to their mental capacity and culpability.

Keywords: Autism Spectrum Disorder; defendants; sentencing; judges; courtroom; jurors; Asperger's Syndrome

Autism spectrum disorders (ASDs) are neurodevelopmental disorders which are typically characterised by impairments in social reciprocal interactions and communication and restricted, repetitive patterns of interests and behaviour.¹ The "true" prevalence of ASD is unknown,² but it is widely considered to occur in approximately 1% of the general population.³ The male–female ratio for ASD prevalence is considered to be 4–5:1.⁴ The

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¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, Washington, DC, 4th rev ed, 2000); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, Washington, DC, 5th rev ed, 2013).

² E Fernell, M A Eriksson and C Gillberg, "Early Diagnosis of Autism and Impact on Prognosis: A Narrative Review" (2012) 5 *Clinical Epidemiology* 33.

³ E Simonoff, "Autism Spectrum Disorder: Prevalence and Cause May Be Bound Together" (2012) 201 *British Journal of Psychiatry* 88.

⁴ E Fombonne, "Epidemiology of Pervasive Developmental Disorders" (2009) 65 *Pediatric Research* 591.



Diagnostic and Statistical Manual fifth edition's (DSM-V)⁵ now defines two main areas of impairment in ASD (previously, it was three main areas) which vary across individuals, symptoms and levels of severity: (1) "persistent deficits in social communication and social interaction" and (2) "restricted, repetitive patterns of behavior, interests, or activities".⁶ The DSM-V's new criteria for ASD have received criticism.⁷ One of the main criticisms is the new criteria's narrow and restricted phenotype of ASD.⁸

In any article exploring ASD in relation to the criminal justice system, it is crucial to provide a brief overview of the findings regarding the relationship between offending and ASD not least because media reports of violent offending committed by individuals with ASDs and a number of academic studies have led to a speculative association between offending and individuals with ASDs.⁹ There has been relatively little empirical investigation of offenders with ASDs¹⁰ with most studies being based on case reports and surveys of criminal groups.¹¹ However, follow-up studies have suggested that, compared with the general population, individuals with ASDs are actually no more likely to commit violent crime and may actually be less likely to commit violent crime.¹²

In the *Diagnostic Statistical Manual of Mental Disorders*,¹³ Asperger syndrome (AS) is one of several previously separate subtypes of autism that were recategorised into the single diagnosis ASD.

⁵ American Psychiatric Association (2013) n 1.

⁶ American Psychiatric Association (2013) n 1.

⁷ L. Waterhouse, *Rethinking Autism: Variation and Complexity* (Academic Press, London, 2013); L. Wing, J. Gould and C. Gillberg, "Autism Spectrum Disorders in the DSM-V: Better or Worse Than the DSM-IV?" (2011) 32 *Research in Developmental Disabilities* 768; J. C. McPartland, B. Reichow and F. R. Volkmar, "Sensitivity and Specificity of Proposed DSM-V Diagnostic Criteria for Autism Spectrum Disorder" (2012) 51 *Journal of the American Academy of Child and Adolescent Psychiatry* 368; E. R. Ritvo, "Postponing the Proposed Changes in DSM 5 for Autistic Spectrum Disorder until New Scientific Evidence Adequately Supports Them" (2012) 42 *Journal of Autism and Developmental Disorders* 2021.

⁸ Fernell, Eriksson and Gillberg, n 6.

⁹ For example, N. M. Mukaddes and Z. Topcu, "Case Report: Homicide By a 10-year-old Girl with Autistic Disorder" (2006) 36 *Journal of Autism and Developmental Disorders* 471; D. Murphy, "Extreme Violence in a Man with an Autistic Spectrum Disorder: Assessment and Treatment within High-security Psychiatric Care" (2010) 21 *Journal of Forensic Psychiatry and Psychology* 462.

¹⁰ K. Dein and M. Woodbury-Smith, "Asperger Syndrome and Criminal Behaviour" (2010) 16 *Advances in Psychiatric Treatment* 37; A. Browning and L. Caulfield, "The Prevalence and Treatment of People with Asperger's Syndrome in the Criminal Justice System" (2011) 11 *Criminology and Criminal Justice* 165.

¹¹ P. S. Chen et al, "Asperger's Disorder: A Case Report of Repeated Stealing and the Collecting Behavior of Adolescent Patient" (2003) 107 *Acta Psychiatrica Scandinavica* 73; I. P. Everall and A. LeCouteur, "Firesetting in an Adolescent Boy with Asperger's Syndrome" (1990) 157 *British Journal of Psychiatry* 284; G. J. Simblett and D. N. Wilson, "Asperger's Syndrome: Three Cases and a Discussion" (1993) 37 *Journal of Intellectual Disability Research* 85; A. H. Söderström, "Clinical Neuropsychiatric Symptoms in Perpetrators of Severe Crimes against Persons" (2005) 59 *Nordic Journal of Psychiatry* 246; J. B. Barry-Walsh and P. E. Mullen, "Forensic Aspects of Asperger's Syndrome" (2004) 15 *Journal of Forensic Psychiatry and Psychology* 96; D. Mawson, A. Grounds and D. Tantam, "Violence and Asperger's Syndrome: A Case Study" (1985) 147 *British Journal of Psychiatry* 566; Mukaddes and Topcu, n 9; Murphy, n 9; J. A. Silva, M. M. Ferrari and G. B. Leong, "What Happened to Jeffrey? A Neuropsychiatric Developmental Analysis of Serial Killing Behavior" in *Proceedings of the American Academy of Forensic Sciences, Volume VIII*, 11 February 2002, Atlanta, Colorado Springs, American Academy of Forensic Sciences; J. A. Silva, M. M. Ferrari and G. B. Leong, "The Neuropsychiatric Developmental Analysis of Serial Killer Behavior" in *American Academy of Psychiatry and the Law Annual Meeting Program* 24 October 2002, Newport Beach, California; Bloomfield, Connecticut, American Academy of Psychiatry and the Law; J. A. Silva et al, "The Genesis of Serial Killing Behavior in the Case of Joel Rifkin using the Combined BRACE/NDM Approach" in *Proceedings of the American Academy of Forensic Sciences, Volume IX*, 11 February 2003, Chicago, Colorado Springs, American Academy of Forensic Sciences; S. Baron-Cohen, "An Assessment of Violence in a Young Man with Asperger's Syndrome" (1988) 29 *Journal of Child Psychology and Psychiatry and Allied Disciplines* 351; S. A. Cooper, W. N. Mohamed and R. A. Collacott, "Possible Asperger's Syndrome in a Mentally Handicapped Transvestite Offender" (1993) 37 *Journal of Intellectual Disabilities Research* 189; I. Hall and J. Bernal, "Asperger's Syndrome and Violence" (1995) 166 *British Journal of Psychiatry* 262; Y. Kohn et al, "Aggression and Sexual Offence in Asperger's Syndrome" (1998) 35 *Israel Journal of Psychiatry and Related Sciences* 293; J. A. Silva, J. C. Wu and G. B. Leong, "Neuropsychiatric Developmental Analysis of Sexual Murder" in *American Academy of Psychiatry and the Law Annual Meeting Program*, 16 October 2003, San Antonio; Bloomfield, Connecticut, American Academy of Psychiatry and the Law.

¹² S. E. Mouridsen et al, "Pervasive Developmental Disorders and Criminal Behavior" (2008) 52 *International Journal of Offender Therapy and Comparative Criminology* 196; M. R. Woodbury-Smith et al, "High Functioning Autistic Spectrum Disorders, Offending and Other Law-breaking: Findings from a Community Sample" (2006) 17 *The Journal of Forensic Psychiatry and Psychology* 108.

¹³ American Psychiatric Association (2013) n 1.

One study which utilised penal register data regarding Hans Asperger's original group of 177 patients found that, in this group, there were no significant differences in the rate and nature of crimes committed compared to the general population. There was only one case of robbery, three cases of bodily injury and a single case of violent and threatening behaviour found in the case records which identified 33 crimes committed over 22 years.¹⁴ One group of researchers reviewed studies of offending behaviour and AS which were published between 1944 and September 1990, and their review of the published work suggested no evidence of an association between violent crime and AS and, in fact, they found evidence to support that the prevalence of violent crime was actually lower in this group (presented in the samples in the literature) compared to the general population.¹⁵ In sum, an increasing number of studies suggest that individuals with ASD are largely law-abiding.¹⁶ Therefore, there is insufficient evidence supporting an association between ASD and criminality (particularly criminality of a violent nature).¹⁷

It is important to consider, when trying to ascertain whether ASD can predispose an individual to commit violent crime, the existence of comorbid disorders. One study by Newman and Ghaziuddin¹⁸ found that "most of the cases of (AS) who commit violent crime suffer from additional psychiatric disorders" which, they argued, is what increased the likelihood of these individuals with ASD engaging in offending behaviour. Psychiatric disorders increase the likelihood of anyone engaging in criminal behaviour.¹⁹ What is particularly noteworthy is the few cases of individuals with a diagnosis of AS without any additional comorbid psychiatric diagnoses, particularly given that some autism traits may actually be a protective factor against engagement in criminal behaviour such as the tendency of individuals with autism to be "scrupulously law abiding".²⁰ In sum, there remains academic disagreement and a lack of sufficient evidence to support an association between high-functioning ASDs (hfASDs) and criminality, particularly in regard to violence.²¹ Importantly, rather than be more likely to engage in offending behaviour or violent behaviour, individuals with ASDs are actually more at risk of being the victim rather than the perpetrator. Indeed, findings by Sobsey et al²² indicate that individuals with developmental disabilities are actually between 4 and 10 times more at risk of being a victim of crime. Other studies have indicated that this group may be more than 10 times as likely to be a victim of sexual assault and more than 12 times as likely to become a victim of robbery.²³

Defendants with ASD in the Courtroom

Given that individuals with ASDs are often impaired in their ability to appreciate the subjective experiences of others, the individual with ASD may therefore not exhibit any expression of empathy or

¹⁴ K Hippler et al, "No Increase in Criminal Convictions in Hans Asperger's Original Cohort" (2010) 40 *Journal of Autism and Developmental Disorders* 774.

¹⁵ M Ghaziuddin, L Tsai and N Ghaziuddin, "Violence in Asperger's Syndrome: A Critique" (1991) 21 *Journal of Autism and Developmental Disorders* 349.

¹⁶ Ghaziuddin, Tsai and Ghaziuddin, n 15; D C Murrie et al, "Asperger's Syndrome in Forensic Settings" (2002) 1 *International Journal of Forensic Mental Health* 59; L Wing, "Asperger's Syndrome: A Clinical Account" (1981) 11 *Psychological Medicine* 115; Woodbury-Smith et al, n 12.

¹⁷ Ghaziuddin, Tsai and Ghaziuddin, n 15; P Howlin, *Autism and Asperger Syndrome: Preparing for Adulthood* (Routledge, Oxon, 2004); Murrie et al, n 16.

¹⁸ S Newman and M Ghaziuddin, "Violent Crime in Asperger Syndrome: The Role of Psychiatric Comorbidity" (2008) 38 *Journal of Autism and Developmental Disorders* 1848.

¹⁹ For example, M Eronen, P Hakola and J Tiihonen, "Mental Disorders and Homicidal Behavior in Finland" (1996) 53 *Archives of General Psychiatry* 497; S Hodgins et al, "Mental Disorder and Crime: Evidence from a Danish Birth Cohort" (1996) 53 *Archives of General Psychiatry* 489; P E Mullen, "A Reassessment of the Link between Mental Disorder and Violent Behaviour, and Its Implications for Clinical Practice" (1997) 31 *Australian and New Zealand Journal of Psychiatry* 3.

²⁰ U Frith (ed), *Autism and Asperger Syndrome* (University Press, Cambridge, 1991).

²¹ Murrie et al, n 16; Howlin, n 17; Browning and Caulfield, n 10.

²² D Sobsey et al (eds), *Violence and Disability: An Annotated Bibliography* (Brookes, Baltimore, 1995).

²³ S J Modell and S Mak, "A Preliminary Assessment of Police Officers' Knowledge and Perceptions of Persons with Disabilities" (2008) 46 *Intellectual and Developmental Disabilities* 183.

intersubjective resonance.²⁴ This may also make them appear cold and calculating. This perceived lack of remorse displayed by the defendant with ASD can be particularly detrimental to them if they are talking about the alleged victim or they are not seen to respond in a typical manner to the account given in court by an alleged victim. For example, in *R v Sultan*,²⁵ where the defendant was diagnosed with AS but not until after the trial, the Court of Appeal (England and Wales) commented that Mr Sultan's defence was not assisted by his "strange behaviour in court, such as reading a book while [the alleged victim] gave her evidence".

A defendant's expression/lack of expression is likely to impact on the jury's perceptions and decisions on the guilt of the defendant and may impact on the judge's sentencing. Individuals with ASD may say things which would be considered strange. They may also make awkward or inappropriate facial expressions. For instance, a defendant with ASD may start laughing when talking about their victim during the court proceedings. In many individuals with ASD, this outward expression may not reflect what they are actually feeling or thinking. Haskins and Silva²⁶ described the case of Mr C who was a deaf man referred for outpatient psychotherapy. The main concern was his inappropriate sexual behaviour. Mr C compulsively propositioned male strangers for sex, most notably in public toilets. This eventually led to an incident where he was physically assaulted by the man he propositioned and was also banned from some public spaces. He also displayed non-verbal behaviours which could be regarded as odd. For example, throughout his first interview, he maintained a fixed smile on his face, irrespective of what he was talking about.²⁷

Individuals with AS or hfASD can often have an odd or pedantic manner of speaking.²⁸ They often have poor non-verbal communication.²⁹ The language that defendants with ASD use can very often be misinterpreted or misconstrued and can also be viewed as "eccentric, tangential and overly formal".³⁰ In *R v Thompson*,³¹ at his trial before a jury, the defendant with AS exhibited a tendency during his evidence "to pick arguments with the prosecutor over comparatively trivial detail, while failing, unless re-directed, to confront the underlying and critical question".

They may also give sudden and unexpected verbal utterances or may suddenly speak at increased volume. Individuals with ASD may also have difficulties with pragmatic communication – difficulty with responding in appropriate ways in social discourse. Such difficulties can be observed across a variety of areas such as the use of gestures, personal space, timing, topic selection and difficulties with understanding non-literal language, metaphors, irony, sarcasm or humour. Lastly, they can have unusual or odd-sounding prosody. Speaking can sound very monotonous without variation in prosodic elements including speech rate and rhythm, pitch/fundamental frequency, loudness, intensity, duration and pause/silence.³² Freckelton³³ also details the case of Brent Mack (who had a diagnosis of autism) who was

²⁴ For example, S Baron-Cohen, *The Essential Difference: The Truth about the Male and Female Brain* (Basic Books, New York, 2003); C L Gillberg, "The Emanuel Miller Memorial Lecture 1991. Autism and Autistic-like Conditions: Subclasses among Disorders of Empathy" (1992) 33 *Journal of Child Psychology and Psychiatry* 813.

²⁵ *R v Sultan* [2008] EWCA Crim 6.

²⁶ B G Haskins and J A Silva, "Asperger's Disorder and Criminal Behavior: Forensic-psychiatric Considerations" (2006) 34 *Journal of the American Academy of Psychiatry and the Law Online* 374.

²⁷ Haskins and Silva, n 26, 374–384, 379.

²⁸ A Klin et al, "Three Diagnostic Approaches to Asperger Syndrome: Implications for Research" (2005) 35 *Journal of Autism and Developmental Disorders* 221; S Foster, "Autism Is Not a Tragedy ... Ignorance Is: Suppressing Evidence of Asperger's Syndrome and High-functioning Autism in Capital Trials Prejudices Defendants for a Death Sentence" (2015) 2 *Lincoln Memorial University Law Review* 9.

²⁹ Wing, n 16.

³⁰ I R Freckelton and D List, "Asperger's Disorder, Criminal Responsibility and Criminal Culpability" (2009) 16 *Psychiatry, Psychology and Law* 16, 31.

³¹ *R v Thompson* [2014] EWCA Crim 836.

³² J McCann and S Peppé, "Prosody in Autism Spectrum Disorders: A Critical Review" (2003) 38 *International Journal of Language & Communication Disorders* 325; Haskins and Silva, n 26.

³³ I Freckelton, "Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts" (2013) 26 *Journal of Applied Research in Intellectual Disabilities* 420.

charged with the murder of his mother.³⁴ A psychiatrist who was called by the prosecution reported that Mack had a tendency to focus on the way questions were asked rather than their content, for example. McKechnie J accepted that Mack's behaviour was unusual and considered that his odd and unusual presentation may cause him "prejudice before jurors". For instance, he had a "monotonous speech with an abnormal, robotic rhythm to it".³⁵

Defendants with ASD may also be perceived as having no interest in the proceedings and/or are considered to be arrogant throughout the court proceedings.³⁶ Additionally, many individuals with ASD have difficulty with making and maintaining eye contact which can make them appear to the jury rude or not concerned with court proceedings. It can also make them appear shifty as if they have something to hide, therefore, making them appear to the jury to be untrustworthy or guilty. For instance, a defendant with ASD may look down at the table in front of them throughout the whole trial. Such behaviour can lead people to think that they are ashamed and cannot look their victims (or at the judge, jurors, etc) in the eye. However, this is a strategy often employed by individuals with ASD because it reduces the amount of stimulation (particular in an anxiety inducing situation like a trial) they are receiving. Essentially it is a coping strategy which affords a degree of isolation for the individual with ASD.³⁷ Defendants with ASD can also appear rude on occasions as some individuals with ASD fail to follow/notice simple conventions in conversation. For instance, when a lawyer is talking to them, they may fail to pick up on cues which signal the end of a conversation.³⁸

Repetitive interest and/or particular obsessions exhibited by the defendant with ASD, either during the court proceedings or exhibited during the alleged offending behaviour(s), may not be understood or can be misinterpreted by the jury. For instance, many individuals with ASD may shift the focus of the court discussions to something that they want to talk about – which may be one of their interests. This may make them appear evasive. When asked a question, they may go on at great length and with great detail – their discourse can be repetitive and return to the defendant's preoccupations. Defendants with ASD could also be considered as bizarre by a jury who do not understand the symptomology of ASD.³⁹ Brendel et al⁴⁰ describe the case of Mr C who had a history of depression and possible diagnoses of Asperger's disorder (AS), obsessive-compulsive disorder and attention-deficit disorder. Mr C reported that the reason he was struggling to sleep at night was his "obsession with pornography". Mr C would spend all evening into the early hours of the morning looking at pornographic websites and watching his collection of "thousands" of pornographic videos. Mr C had also amassed an extensive collection of "paper dolls" which he had created from cutting up images of women in mainstream and pornographic magazines. He reported that he would frequently spend five hours or more in succession with his "paper dolls".⁴¹

Non-typical repetitive narrow interests is one of the key symptoms of ASD which is often found to be associated with offending behaviour in individuals with hfASD. A well-known example of this is the case involving a man who fixated on city transit-related activities. The man was arrested for non-authorised driving of subway trains and buses. He was also directing traffic around New York City Transit Authority construction sites.⁴² Such repetitive narrow interests in individuals with ASD can also be related with stealing and hoarding behaviours.⁴³ Milton et al⁴⁴ described the case of a man who reported a fascination

³⁴ *Western Australia v Mack* [2012] WASC 127.

³⁵ I Freckelton, "Forensic Issues in Autism Spectrum Disorder: Learning from Court Decisions" in M Fitzgerald (ed), *Recent Advances in Autism Spectrum Disorders – Volume II* (Intech Press, Zagreb, 2013) Ch 8, 157–174, 168.

³⁶ N Archer and E A Hurley, "A Justice System Failing the Autistic Community" (2013) 4 *Journal of Intellectual Disabilities and Offending Behaviour* 53.

³⁷ Foster, n 28.

³⁸ Murrie et al, n 16.

³⁹ C N Cea, "Autism and the Criminal Defendant" (2014) 88 *St John's Law Review* 495.

⁴⁰ D H Brendel et al, "I See Dead People: Overcoming Psychic Numbness" (2002) 10 *Harvard Review of Psychiatry* 166.

⁴¹ Brendel et al, n 40.

⁴² J Tietz, "The Boy Who Loved Transit: How the System Failed an Obsession", (2002) 304 *HARPERS* 43.

⁴³ Chen et al, n 11; Haskins and Silva, n 26.

⁴⁴ J Milton et al, "Case History of Comorbid Asperger's Syndrome and Paraphilic Behaviour" (2002) 42 *Medicine, Science and the Law* 237.

with female genitalia that he had for a long time. He was most fascinated with the image of women being gynaecologically examined by a doctor. In order to pursue his fascination, he would pose as a medical researcher on telephone “chat lines” and would ask the women telephone operators to describe their experiences of their gynaecological examinations. He would usually masturbate during these telephone calls.⁴⁵ Another example is the case of a man who had violent fantasies and an intense interest in poisons. He would assault women for idiosyncratic reasons. For instance, he attacked a woman with a saw blade because she wore shorts. Also, he stabbed a woman using a screw driver because she was driving and he did not like women drivers.⁴⁶ One case described by Murrie et al⁴⁷ involved GH, a 33-year-old unmarried male who was prosecuted for sexual assault against his nine-year-old daughter and one of her peers. In the five years leading up to his offense, he spent an extensive amount of time collecting thousands of paper dolls. He would use them to play sexual games and would integrate photos of himself with them.

Present Review

There has been some concern highlighted in the literature regarding how juries and judges handle cases which involve a defendant with ASD. Specifically, there is concern that jurors may be negatively influenced by stigmatising beliefs and misconceptions with respect to ASD.⁴⁸ The relatively little research on judicial perceptions or decision-making regarding individuals with ASD indicates that judges have limited understanding and familiarity with hfASD and ASD.⁴⁹ As highlighted by Mayes,⁵⁰ jurors may hold misconceptions about ASD which may have a negative impact on the juror’s decision regarding a defendant with ASD.⁵¹ Jurors may also be sceptical of the information provided by expert witnesses,⁵² and the expert witnesses may also have limited understanding and familiarity with ASD,⁵³ particularly with the ways in which ASD traits may contribute to different types of offending behaviour. The present systematic review will identify studies which investigate jurors’ (using mock jurors) and/or judges’ evaluations of defendants with ASD or studies which investigate whether the defendant diagnosis of ASD impacts on sentencing.

METHOD

Six internet-based bibliographic databases were used for the present review including PsycARTICLES Full Text; AMED (Allied and Complementary Medicine) 1985 to April 2016; PsycEXTRA 1908 to 18 April 2016; PsycINFO 1806 to April Week 4 2016; Social Policy and Practice 201601; Epub Ahead of Print, In-Process & Other Non-Indexed Citations, Ovid MEDLINE(R) Daily and Ovid MEDLINE(R) 1946 to Present. No date limitations were placed on the search conducted on these databases above. These six databases were searched in order to identify studies which investigated ASD in the court process. For instance, studies which looked at the jurors’ perception of defendants with autism. The flowchart in Figure 1 describes the process of eliminating non-relevant articles in the present review following Preferred Reporting Items for Systematic reviews and Meta-Analyses (PRISMA) guidelines.⁵⁴ The PRISMA guidelines were developed by an international group which consisted of experienced authors and methodologists. The PRISMA Statement contains a 27-item checklist and a four-phase flow

⁴⁵ Milton et al, n 44.

⁴⁶ Mawson, Grounds and Tantam, n 11.

⁴⁷ Murrie et al, n 16.

⁴⁸ For example, I Rapin, “Autism” (1997) 337 *New England Journal of Medicine* 97; S E Sundby, “The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony” (1997) 83 *Virginia Law Review* 1109; T A Mayes, “Persons with Autism and Criminal Justice Core Concepts and Leading Cases” (2003) 5 *Journal of Positive Behavior Interventions* 92.

⁴⁹ Freckelton and List, n 30.

⁵⁰ Mayes, n 48.

⁵¹ Rapin, n 48.

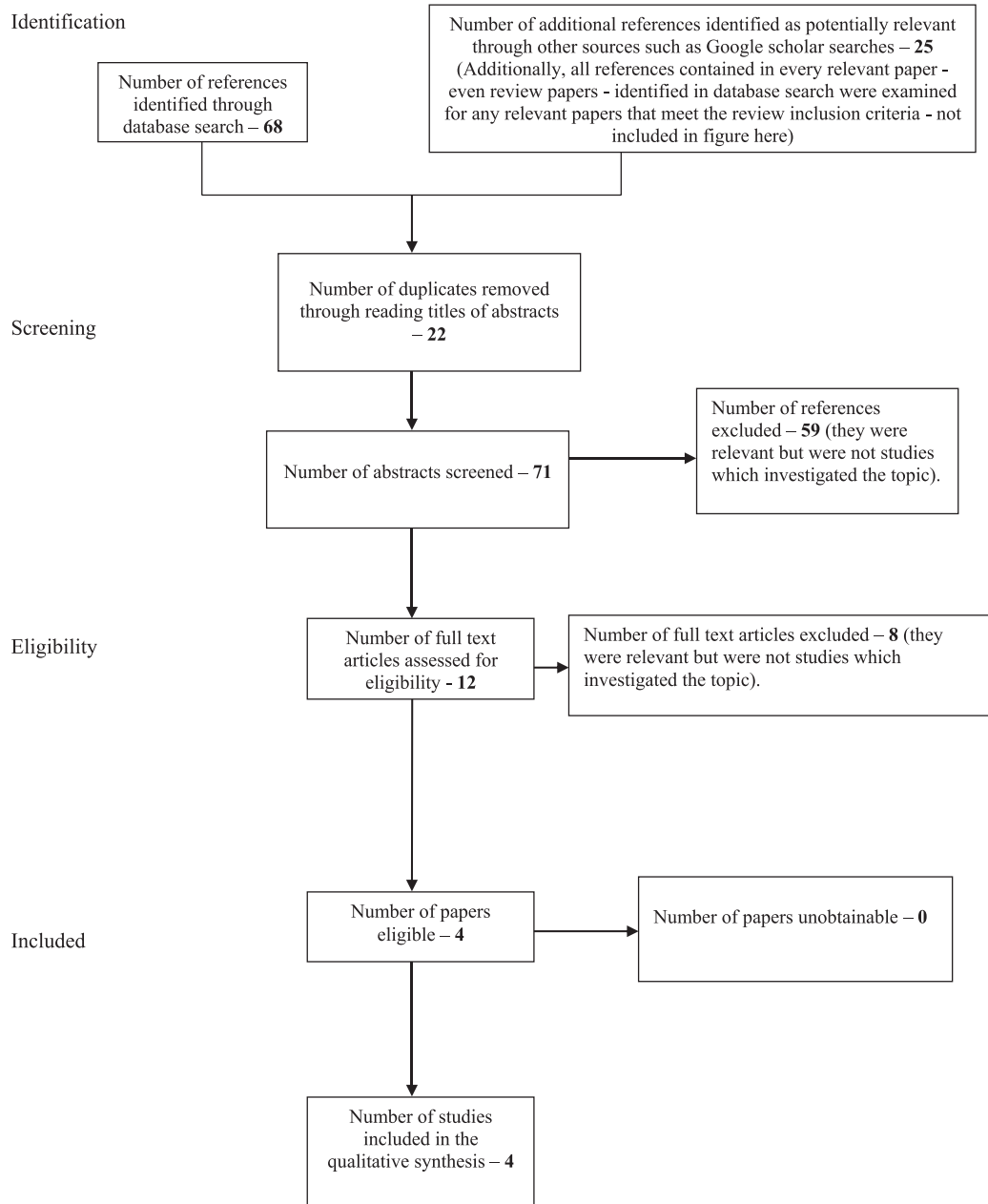
⁵² Sundby, n 48.

⁵³ J W Jacobson and J A Mulick, “System and Cost Research Issues in Treatments for People with Autistic Disorders” (2000) 30 *Journal of Autism and Developmental Disorders* 585.

⁵⁴ A Liberati et al, “The PRISMA Statement for Reporting Systematic Reviews and Meta-analyses of Studies That Evaluate Health Care Interventions: Explanation and Elaboration” (2009) 151 *Annals of Internal Medicine* W-65.

diagram. The checklist consists of items which are considered key to ensuring transparent reporting in a systematic review. Numerous permutations of the search criteria was also entered into Google scholar in case relevant articles were found that were not identified in the database searches (eg autism AND jury AND defendant)⁵⁵

Figure 1. Flow of information through systematic review.



⁵⁵ D Moher et al, "Preferred Reporting Items for Systematic Reviews and Meta-analyses: The PRISMA Statement" (2009) 151 *Annals of Internal Medicine* 264; Liberati et al, n 54.

Duplicates were excluded prior to the retrieval of references. Searches on all six databases were conducted on 2 May 2016. The following search criteria were entered into the six databases (ASD or “autism spectrum disorder*” or “autistic spectrum disorder*” or autism* or asperger* or “autism spectrum condition*” or “autistic spectrum condition*”).m_titl. AND (juror* or jury or juries or defendant* or sentenc* or judge or court*).m_titl. The search returned 68 articles. There were 22 duplicates and after these were removed there were 46.

In addition to these database searches, numerous permutations of ASD and other search terms relating to the court process were entered into Google Scholar and thoroughly searched for articles which were not identified through the database searches, for instance, “ASD and jury”; “autism and sentencing”; “autism and jurors”; “asperger’s and court”; autism and “jurors’ perceptions” and asperger and “jurors’ perceptions”.

The reference section was carefully examined for potential relevant studies in each systematic review, literature review or commentary article. All references contained in the articles identified as relevant from the database searches were also examined for possible inclusion in this review. Given the relatively little research in this field, this review is more inclusion than exclusion.

Abstracts for each reference were obtained and screened using the following criteria:

Inclusion criteria:

- (1) Human study population; and
- (2) Articles which investigate ASDs in the court system (eg studies which investigated jurors’ (or mock jurors’) and or judges’ evaluations of a defendant with an ASD or investigated whether the defendant diagnosis of ASD impacts on sentencing).

Exclusion criteria:

- (1) Article not published in English;
- (2) Articles which investigate ASDs in the court system in terms of the individuals with autism being the victim or the witness.
- (3) Articles which report on vaccines and autism in the courts.

RESULTS

Only four studies were identified which investigated jurors’ and/or judges’ evaluations of a defendant with an ASD or investigated whether the defendant diagnosis of ASD impacts on sentencing.⁵⁶ In one study, Berryessa et al⁵⁷ designed a three-part survey in order to explore potential jurors’ attitudes regarding a defendant’s diagnosis of hfASD with respect to “perceptions and decisions surrounding legal and moral responsibility, personal characteristics of the offender, the introduction of psychiatric and genetic information, and the condition’s influence on the facts of the case”.⁵⁸ The sample comprised of 623 jury-eligible US adults, all of whom took part in the three parts of the survey. In part 1 of the survey, participants were asked to imagine that they were a juror on a case. The case that participants were presented with included a fictional criminal case summary (which was based on the real case of *R v Kagan*)⁵⁹ which involved a defendant (MK) who had been charged with assault of his roommate. The case summary consisted of about 300 words and provided the facts of the case, the background of

⁵⁶ C M Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism” (2014) 5 *Journal of Intellectual Disabilities and Offending Behaviour* 97; C M Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders” (2014) 3 *International Journal of Criminology and Sociology* 46; C M Berryessa et al, “Impact of Psychiatric Information on Potential Jurors in Evaluating High-functioning Autism Spectrum Disorder (hfASD)” (2015) 8 *Journal of Mental Health Research in Intellectual Disabilities* 140; C M Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism” (2016) 48 *Journal of Autism and Developmental Disorders* 2770.

⁵⁷ Berryessa et al, n 56.

⁵⁸ Berryessa et al, n 56, 140–167, 141.

⁵⁹ *R v Kagan* 2007 261 NSR (2d) 285 (NSSC [Canada]).

the defendant and the defendant's trial behaviour. The participants were provided with definitions for a number of legal terms including "criminal intention", "legal responsibility", "moral responsibility" and "free will". There was no psychiatric evidence or testimony provided to participants in part 1 of the survey. Participants were subsequently asked to rate their opinions on a Likert scale ranging from 1 to 5 ("strongly agree" to "strongly disagree") on a set of 12 questions. In part 2 of the survey, participants were given an additional summary of the psychiatric testimony (330 words) presented during the trial, detailing that MK's diagnosis of hfASD would have historically been AS. This additional evidence indicated that his hfASD contributed towards MK's behaviour and the facts of the case. Information about hfASD, diagnostic characteristics and evidence on genetic origin of ASD was also provided as part of the evidence. After reading the new evidence and taking it into consideration, participants were asked to re-rate their opinions on the same 12 questions initially presented in part 1. In part 3, based on all the information given in parts 1 and 2 of the survey, participants were asked to answer a number of forced ranking and multiple choice questions on MK. Specifically, his condition, his dangerousness, legal consequences and his legal and moral responsibility. Part 3 was independent of the questions asked in parts 1 and 2. In part 3, the respondents were asked how and why the responses they had provided at part 1 had changed in part 2 following the additional psychiatric information, the offender's condition and the genetic propensity of MK's disorder they received before completing part 2. Definitions at this stage were also provided for the terms "criminal intention", "legal responsibility", "moral responsibility" and "free will".⁶⁰

The findings by Berryessa et al⁶¹ from the survey overall suggested that respondents' opinions were significantly affected following the additional summary of the psychiatric testimony (that contained information regarding MK's hfASD diagnosis and how it may have contributed to his behaviour) provided at part 2 of the survey. The majority of the respondents' opinions did not differ regarding MK's legal responsibility following the additional psychiatric information provided at part 2. The majority of respondents agreed both before (86.4%) and after (74.3%) the psychiatric information on MK's hfASD that he should be held as legally responsible for his charge. However, the difference between 86.4% and 74.3% was found to be significantly different, statistically. Despite being found to be statistically significant, the majority of respondents agreed both before (88.8%) and after (80.6%) the psychiatric information on MK's diagnosis that he had committed a criminal action. However, the percentage of respondents who agreed that MK had criminal intent in part 1 was significantly reduced following the information regarding his diagnosis in part 2 (53.9% to 31.1%, respectively).

Compared to the before and after questions in parts 1 and 2, in the stand-alone contextualisation questions in part 3, Berryessa et al⁶² found similar respondent attitudes regarding MK's legal responsibility. The majority were not in agreement with the following: "MK is not guilty of any crimes" and "MK does not understand what he did was wrong, and, therefore, should not be held accountable" (75.4% and 72.7%, respectively). The percentage of respondents who held that the opinion MK was competent to stand trial was 64.5% and the percentage of respondents who did not agree with the statement "MK did not have control over the criminal actions he committed because of his condition" was only a slight majority at 55.4%. Interestingly, despite the majority of respondents having the opinion that MK was legally responsible, in terms of the punitive consequences of MK's actions, the study found that with the statement "MK should be sentenced to prison time", 46.9% disagreed with this and 45.1% agreed that prison should be considered cruel and unusual punishment. Therapy as an alternative to prison was the opinion of 57.6% of the respondents. In the before and after questions, there were also some shifts in responses which indicated that after learning of MK's diagnosis in the psychiatric information provided in part 2 respondents may be more lenient in their views of MK's moral responsibility. Following the additional psychiatric information provided in part 2, the percentage of respondents who held the opinion that MK was morally responsible went down from 81.5% to 62.3% ($p < 0.0001$) and the respondents

⁶⁰ Berryessa et al, n 56.

⁶¹ Berryessa et al, n 56.

⁶² Berryessa et al, n 56.

who agreed that MK should feel bad for his actions went down from 78.8% to 67.7% ($p < 0.0001$). The perceptions of MK's trial behaviour were significantly affected by knowledge of his condition in the respondents, with the percentage of respondents holding the opinion that MK's trial behaviour made him appear as if he "did not care" reducing from 83.9% to 58.6% ($p < 0.0001$) and the respondents who had the opinion that MK's trial behaviour made him "look guilty" reducing from 41.7% to 32.9% ($p < 0.0001$). Fifty-six percent of the respondents reported that there was a change in their opinions regarding MK's trial behaviour following the additional summary of the psychiatric testimony (provided in part 2). Of these 56% of respondents who reported this, 96.8% reported, after reading the psychiatric information about MK, having a more positive response to him. Despite the shifts in opinion between the responses given in part 1 and those responses in part 2, in the stand-alone contextualisation questions in part 3, the majority of respondents reported believing that MK's diagnosis of hfASD did not impact on either his legal (64.1%) or moral (58.4%) responsibility for his offending behaviour. However, a sizable percentage of respondents had the opinion that MK was less legally and/or morally responsible as a result of his diagnosis of hfASD (30.8% and 35.2%, respectively). The psychiatric evidence presented in part 2 of the survey was reported to only "somewhat change" the original views of the case in 66.3% of the respondents. Regarding the genetics of the disorder, 41.1% of the respondents held the opinion that "MK was genetically predisposed to the behaviours that led to the actions against his roommate." This is consistent with the finding that 53.1% of the respondents stated that the fact that MK's condition is genetic was "very or somewhat influential on their views of the case".⁶³

In another study, this time based on semi-structured telephone interviews with 21 California Superior Court Judges, Berryessa⁶⁴ investigated how they perceived and understood hfASDs and their understanding of how this diagnosis can impact on a person's ability to "formulate criminal intent" and control their criminal behaviour.⁶⁵ The interview guide comprised of 20 questions and came under three categories, namely, (1) "genetic disorders, both generally and related to criminal offending"; (2) "ASDs and hfASDs, both generally and related to criminal offending"; and (3) "personal experiences with and media portrayal of hfASDs, both generally and in a criminal justice context". Findings revealed that all 21 judges in the sample reported having had previous experience of hfASD (either personal or professional). Previous case experience with defendants with a diagnosis of hfASD was reported by 7 of the 21 judges. Specifically, four judges reported multiple cases and three judges recalled just one case in their professional experience. Eighteen judges reported that they had a personal experience with individuals with hfASDs. Three main themes were identified in the judge's interviews, namely, predisposition to behaviour; the offender's view of the world and criminal intention; and the offender's difficulty controlling behaviour and lack of impulse control. The key findings of each of these three main themes will be described in turn.⁶⁶

First, regarding the category "predisposition to behaviour", 13 of the 21 judges had provided responses which focused on the theme of predisposition to behaviour. Predisposition to behaviour would suggest that offenders with a diagnosis of hfASD are predisposed to behave in specific ways due to their disorder. This group of 13 judges included 6 of the 7 judges with previous case experience involving defendants with hfASD. Findings showed that for offenders with hfASD, the majority of judges expressed their uncertainty with understanding and making decisions with respect to their criminal responsibility and their sentence. One judge who had experience of multiple cases where the defendant had a diagnosis of ASD admitted to being hesitant regarding whether a diagnosis of hfASD actually impacts on the criminal responsibility of a defendant. Second, regarding the category "the offender's view of the world and criminal intent", 8 of the 21 interviews comprised of discussions of the way offenders with ASD "view the world" and how this and their diagnosis impacts on their criminal intent. Several judges

⁶³ Berryessa et al, n 56.

⁶⁴ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

⁶⁵ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

⁶⁶ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

reported that, given offenders with hfASD do not “view the world” in the same way as offenders without a diagnosis of hfASD do, it becomes challenging for judges to fully understand the role of intent in these offenders’ actions and how it should be considered during sentencing decisions. Additionally, a diagnosis of hfASD was also reported as being a possible mitigating factor by questioning the existence of “intent and a wilful criminal act”. Third, the theme of “offender’s difficulty controlling behaviour and lack of impulse control” was identified in nine of the interviews.⁶⁷

In another study, Berryessa⁶⁸ investigated judicial perceptions of media portrayals of offenders with hfASD. Data was collected during semi-structured telephone interviews with 21 California Superior Court Judges as part of a larger study investigating ways in which judges perceive and formulate decisions regarding those offenders with a diagnosis hfASDs and the interview guide was a set of 20 semi-structured questions (as reported for the study above).⁶⁹ The questions in these semi-structured interviews which were relevant to the present study’s main aims were those investigating the judges’ opinions regarding the portrayal in the media of individuals with hfASDs. Some examples of the question include “In your opinion”; “how does the media usually portray Autistic Spectrum Disorders or Asperger’s Syndrome?”; “What has shaped your view of Asperger’s Syndrome or other Autistic Spectrum Disorders when it comes to criminal offenders, the legal or the criminal justice systems?”; and “How did the Sandy Hook Elementary School tragedy and its aftermath, or other media stories in the last 1–2 years, change or affect your views on High Functioning Autistic Spectrum Disorders or Asperger’s Syndrome?”. Analysis of the interviews identified three broad categories: (1) “General Media Portrayal of hfASDs”; (2) “Media Portrayal of hfASDs and Criminality”; and (3) “Media Portrayal of hfASDs and the Sandy Hook Shooting”. For the category “General Media Portrayal of hfASDs”, although numerous judges reported that portrayals of hfASDs in the media can be positive or negative, the commonly held view was that frequently these portrayals are a combination of the two. Concerns regarding the media focus on the negative features of hfASD were raised. Judges who regarded the portrayal of hfASD in the media as only positive focused on portrayals of the disorder in fiction and the way the representation in the media increases the general public’s awareness of ASD. Moreover, the rationale of judges who regarded the portrayal of hfASD in the media as positive centres around how exposure increases the general public’s understanding and acceptance of hfASD.⁷⁰ On the other hand, for the category “Media Portrayal of hfASDs and Criminality”, Berryessa⁷¹ found that the large majority of judges regarded media coverage of offending behaviour and hfASDs to be misleading and harmful. By recognising this negative bias, judges can try to mitigate against its possible harmful effects on their opinions and decisions.⁷² Finally, for the third category “Media Portrayal of hfASDs and the Sandy Hook Shooting”, Berryessa⁷³ asked the judges to discuss their perceptions of the coverage of the Sandy Hook Shooting in Newtown, Connecticut in the media. Judges reported that their personal views were not impacted by the media coverage of the Sandy Hook Shooting. However, the majority of judges reported that the coverage of the Sandy Hook Shooting has negatively affected the public.⁷⁴

Lastly, Berryessa⁷⁵ presented findings in a brief report which involved preliminary data on the attitudes of 21 US trial judges for the California Superior Court on the sentencing of offenders with hfASD. A semi-structured 20-question interview protocol was developed by the author, Berryessa, following

⁶⁷ Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

⁶⁸ Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁶⁹ Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

⁷⁰ Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁷¹ Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁷² Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁷³ Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁷⁴ Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56.

⁷⁵ Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56.

a thorough literature review on forensic aspects of and legal issues involving hfASD (as reported in previous study discussed above).⁷⁶ Analysis of the interviews revealed two main categories, namely, (1) hfASD as a factor in sentencing and (2) sentencing options for offenders with hfASD. For the category of “hfASD as a Factor in Sentencing”, Berryessa⁷⁷ found that 15 judges reported that an individual’s diagnosis of hfASD would be an important consideration when making sentencing decisions and that information regarding a defendant’s diagnosis of hfASD could help judges and jurors determine whether the disorder contributed to the offending behaviour in some way. Moreover, hfASD was considered to be either a mitigating or aggravating factor by 12 of these 15 judges. Nine judges reported that hfASD would be a potential mitigating factor in sentencing. A large majority of judges that considered hfASD to be a possible mitigating factor questioned whether an individual’s actions would be “completely wilful or if his criminal intent would be potentially influenced by the symptoms of the condition”.⁷⁸ Three of the 21 judges considered hfASD to be a potential aggravating factor. For the second category of “Sentencing Options for Offenders with HFA”, Berryessa⁷⁹ found that a significant majority of judges reported that, given that the prison environment would potentially be particularly damaging for individuals with hfASD, they would likely want to try and avoid incarcerating such individuals. The present study found that judges emphasised the needed for alternatives to incarceration for offenders with hfASD. However, they were also fully aware of the fact that the criminal justice system may not have the ability to offer other diversionary measures as an alternative to incarceration.⁸⁰

DISCUSSION

Only four studies were identified which investigated jurors’ and/or judges’ evaluations of a defendant with an ASD or investigated whether the defendant diagnosis of ASD impacts on sentencing.⁸¹ First, the study by Berryessa⁸² comprised a sample of judges and the study by Berryessa et al⁸³ comprised a sample of potential jurors. In their study exploring how 21 California Superior Court Judges perceived hfASDs and the disorder’s effects on an offender’s ability to formulate criminal intent and control behaviour, Berryessa⁸⁴ found that, irrespective of previous experiences of cases involving defendants with hfASD, judges perceived that offenders with a diagnosis of hfASD have a unique “view of the world” and as a result, their actions are not always under their control and this should be taken into account. A diagnosis of hfASD was considered by many judges to be a potentially mitigating factor in terms of their assessment of the defendant’s criminal intent, responsibility and when making their sentencing decisions. Despite this, many judges reported that they did not know how to use the psychiatric information on ASD effectively to help inform their legal decisions. Consistent with previous literature⁸⁵ they found that the judges in their sample had limited ability to fully understand the disorders, the symptoms of the

⁷⁶ Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

⁷⁷ Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56.

⁷⁸ Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56, 2770–2773, 2–3.

⁷⁹ Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56.

⁸⁰ Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56.

⁸¹ Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56; Berryessa, “Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders”, n 56; Berryessa et al, n 56; Berryessa, “Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism”, n 56.

⁸² Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

⁸³ Berryessa et al, n 56.

⁸⁴ Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

⁸⁵ For example, Freckelton and List, n 30; Freckelton, n 33; Berryessa, “Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism”, n 56.

disorder and how to factor this into their decisions. However, as noted by Berryessa,⁸⁶ there are some limitations with this study including the ability to generalise and the relatively small sample size of the present study.⁸⁷ In the second study, Berryessa et al⁸⁸ found in their survey of potential jurors that most respondents were influenced by the information they received on hfASD. Findings indicated that legal responsibility or criminality is overall not impacted by the knowledge of a defendant's hfASD diagnosis. However, Berryessa et al⁸⁹ study did show an effect on the beliefs of the respondents regarding MK's criminal intent with nearly 50% not expressing any disagreement with the following statement: "MK did not have full control over the criminal actions he committed because of his condition." Although the majority of respondents still considered MK to be morally responsible for his offending behaviour, overall respondents appeared to be more lenient in their beliefs regarding his moral responsibility, as opposed to his legal responsibility, following the psychiatric information regarding his diagnosis. Regarding MK's expression of remorse, it was found that respondents were "less likely to believe that MK should show remorse for his actions"⁹⁰ following the psychiatric information regarding his diagnosis of hfASD. In terms of the length of MK's prison sentence and the legal consequences of his criminal actions, the study found that the opinion of the respondents was that MK's diagnosis should be a mitigating factor with respect to these. In sum, the majority of the respondents in the sample reported that the legal responsibility of an individual should generally not be affected by a diagnosis of hfASD. However, many indicated that hfASD should be considered as a mitigating factor when considering the individual's moral responsibility and the legal consequences of their offending behaviour.⁹¹

In the third study identified in the present review, Berryessa⁹² interviewed 21 California Superior Court Judges to survey a number of things including their perceptions on the representation of hfASDs in the general media, the portrayal of hfASD and criminality in the media and the media portrayal of hfASD and the Sandy Hook Shooting. Overall, judges regarded the portrayal of hfASDs in the general media as a combination of representations which are both negative and positive. Nearly all judges described the media coverage of hfASDs and criminal offending as being very negative (eg being misleading and creating false associations between violent behaviour and hfASD).⁹³

Lastly, in the study conducted by Berryessa⁹⁴ findings revealed that overall, the majority of judges reported that hfASD would be an important factor to consider in sentencing. The study suggested that the judges may also consider hfASD to be either a mitigating or aggravating factor. More judges considered hfASD as mitigating. However, the fact that some judges were found to report hfASD as an aggravating factor indicates that there may be potential negative consequences to providing information regarding diagnosis of hfASD in the defendant in court during sentencing. For instance, it indicates that if the judge perceives individuals with a diagnosis of hfASD as being "inherently dangerous" or that recidivism is more likely given the impulse control problems related with hfASD, this may lead to a less lenient sentence decision. When thinking about sentencing, many judges were suggested to be sympathetic and aware of the difficulties associated with hfASD. A majority of judges reported that they would rather employ other alternatives than sentencing the individual with hfASD to prison.

⁸⁶ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

⁸⁷ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

⁸⁸ Berryessa et al, n 56.

⁸⁹ Berryessa et al, n 56.

⁹⁰ Berryessa et al, n 56, 140–167, 155.

⁹¹ Berryessa et al, n 56.

⁹² Berryessa, "Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders", n 56.

⁹³ Berryessa, "Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders", n 56.

⁹⁴ Berryessa, "Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism", n 56.

Sentencing and ASD

The present systematic review identified only one study which investigated the impact of a diagnosis of ASD in a defendant on sentencing.⁹⁵ Such research is important as sentencing is a key consideration in defendants with a diagnosis of ASD. Cea⁹⁶ presented a case for considering ASD as a mitigating factor in sentencing. Considering ASD as a mitigating factor may impact on rehabilitation. A sentence that is too long may be particularly harmful for defendants with a diagnosis of ASD.⁹⁷ Expert evidence is likely to have a significant impact on sentencing and on the court's sentencing options where the expert medical opinion is that the defendant's ASD was relevant to the defendant's mental state at the time of the offence.⁹⁸

Defendants with ASD: The Relevance of Expert Evidence at Trial to Assist the Decision-makers

If the jury is not informed of the defendant's diagnosis of ASD, the impact of a negative demeanour may have a detrimental implication for defendants with ASD.⁹⁹ Given many individuals with ASD's impaired ability to appreciate the subjective experiences of other individuals, the individual with ASD may not exhibit any expression of empathy or intersubjective resonance.¹⁰⁰ If speaking about a victim, this lack of exhibited remorse or empathy can be particularly detrimental to the defendant with ASD in a criminal trial.¹⁰¹ Exhibition of remorse is considered by both judges and juries to be significantly relevant to sentencing.¹⁰² In addition to the expression of remorse, or lack of, individuals with ASD may say things which seem strange on the stand or make awkward or inappropriate facial expressions. Additionally, it has also been highlighted that the language that defendants with a diagnosis of ASD use can frequently be misinterpreted and also viewed as eccentric, tangential and overly formal.¹⁰³ The literature has also suggested that defendants with ASD may be perceived as having no interest and/or are being arrogant during court proceedings.¹⁰⁴ Lastly, the jury may not understand and may interpret the repetitive interests and/or particular obsessions exhibited by the defendant with ASD as being bizarre.¹⁰⁵ In sum, there are a variety of features of ASD which may impact negatively on both the judge's and jurors' perception of the defendant with a diagnosis of ASD.¹⁰⁶ Recognising that these behaviours are an expression of traits

⁹⁵ Berryessa, "Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism", n 56.

⁹⁶ Cea, n 39.

⁹⁷ Cea, n 39; C Allely, "Experiences of Prison Inmates with Autism Spectrum Disorders and the Knowledge and Understanding of the Spectrum amongst Prison Staff: A Review" (2015) 6 *Journal of Intellectual Disabilities and Offending Behaviour* 55; A Lewis et al, "Development and Implementation of Autism Standards for Prisons" (2015) 6 *Journal of Intellectual Disabilities and Offending Behaviour* 68; C Newman, A Cashin and C Waters, "A Hermeneutic Phenomenological Examination of the Lived Experience of Incarceration for Those with Autism" (2015) 36 *Issues in Mental Health Nursing* 632; C E Robertson and J A McGillivray, "Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues" (2015) 26 *The Journal of Forensic Psychiatry and Psychology* 719.

⁹⁸ P Cooper and C Allely, "The Curious Incident of the Man in the Bank: Procedural Fairness and a Defendant with Asperger's Syndrome" (2016) 180 *Criminal Law and Justice Weekly* 632; P Cooper, P Backen and R Marchant, "Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court" (2015) 6 *Criminal Law Review* 420.

⁹⁹ Haskins and Silva, n 26; Cea, n 39.

¹⁰⁰ For example, Baron-Cohen, n 24; Gillberg, n 24.

¹⁰¹ Cea, n 39.

¹⁰² Haskins and Silva, n 26.

¹⁰³ Freckelton and List, n 30.

¹⁰⁴ Archer and Hurley, n 36.

¹⁰⁵ Cea, n 39.

¹⁰⁶ Allely, n 98.

of ASD is imperative in order to reduce or avoid any unfair negative impact this may have on how the defendant with ASD is perceived by the judge and jury during the court proceedings.¹⁰⁷

As an example, Freckelton¹⁰⁸ described the case of *Western Australia v Mack*.¹⁰⁹ In this case, a psychiatrist provided evidence in relation to the fitness for trial of a man with a diagnosis of ASD charged with murdering his mother. While acknowledging that Mack's behaviour was unusual, McKechnie J permitted the trial to proceed and was not in agreement that Mack's odd behaviour would produce prejudice before jurors. However, he did rule that due to Mack's autism and its general impact on the trial process, the trial would be conducted before a judge sitting without a jury.¹¹⁰ Another good example of a case where the defendant's AS was taken into consideration by the judge was the New Zealand High Court in *Glover v Police*¹¹¹ also described in the article by Freckelton.¹¹² Mr Glover had been charged with harassment offences amounting to stalking. In this case, it considered that the imposition of a sentence on conviction would have a "disproportionate and counter-therapeutic effect"¹¹³ on Mr Glover. Although Mr Glover did not express any remorse and had not offered to make amends, this behaviour was considered to attributable to his AS.¹¹⁴

In the case of *R v Thompson*,¹¹⁵ the defendant was convicted in 2007, after a Crown Court jury trial, of sexual offences committed against male children. "The possibility that the appellant was suffering from Asperger's syndrome was first raised by a prison counsellor in August 2008 during preparation for a parole board hearing." The formal diagnosis was made by a clinical psychologist shortly thereafter. Relying on fresh medical evidence regarding his diagnosis, the defendant successfully challenged the safety of his convictions. The Court of Appeal (England and Wales) was satisfied that the jury may have been assisted by expert evidence of the defendant's ASD diagnosis when assessing his alleged criminal conduct and also "in assessing the content of his evidence and the manner in which it was delivered". The court found Mr Thompson's convictions were unsafe and quashed them. In England and Wales, there is no requirement on the defence to inform the jury of a defendant's ASD to help them understand the defendant's presentation in court. The defendant's diagnosed condition (if it is to be explained to the jury) needs explaining in lay person's language; words and phrases such as "a neuro-developmental condition", "social interaction impairment" or "unusually intense and circumscribed interests" are likely to be unhelpful unless explained and related directly to the particular defendant (eg describing how particular features of autism might have contributed to the defendant's behaviour).¹¹⁶ In *R v Hayes*,¹¹⁷ the defendant, a former bank trader and maths genius,¹¹⁸ was convicted at trial for offences of dishonesty and sentenced to 14 years in prison. On appeal, Mr Hayes' sentence was reduced to 11 years by the Court of Appeal (England and Wales) which noted that though the defendant's "culpability was high and the harm serious ... taking into account all the circumstances (in particular his age, his non-managerial position in the two banks, and his mild Asperger's condition), that the overall sentence was longer than was necessary to punish the appellant and to deter others". It is questionable what the jury understood by the description of "mild Asperger's condition"; however, that point was not explored on appeal.

¹⁰⁷ Archer and Hurley, n 36; M Woodbury-Smith and K Dein, "Autism Spectrum Disorder (ASD) and Unlawful Behaviour: Where Do We Go from Here? (2014) 44 *Journal of Autism and Developmental Disorders* 2734; Allely, n 98.

¹⁰⁸ Freckelton, n 33.

¹⁰⁹ *Western Australia v Mack* [2012] WASC 127.

¹¹⁰ Freckelton, n 33.

¹¹¹ *Glover v Police* [2009] NZHC 1150.

¹¹² Freckelton, n 33.

¹¹³ Freckelton, n 33, 420–434, 428.

¹¹⁴ Freckelton, n 33.

¹¹⁵ *R v Thompson* [2014] EWCA Crim 836. A case said to turn on its own facts in *R v Grant-Murray* [2017] EWCA Crim 1228.

¹¹⁶ Cooper and Allely, n 99.

¹¹⁷ *R v Hayes* [2015] EWCA Crim 1944.

¹¹⁸ Cooper and Allely, n 99.

Procedural Adjustments at Court to Facilitate Communication and the Defendant's Effective Participation

In 2013, *Criminal Procedure Rules 2013* (UK) in England and Wales introduced for the first time a requirement that judges take every reasonable step to “facilitate the participation of any person, including the defendant”.¹¹⁹ In *Galo v Bombardier Aerospace Ltd*,¹²⁰ where the claimant with AS was pursuing a claim against his former employers, the Court of Appeal (Northern Ireland) emphasised the “need to ensure fairness in hearings where one or more parties suffers from a disability”.

One such step to facilitate participation and ensure fairness is the communication support of an intermediary for the defendant; the role of the intermediary as it was devised by the second author and developed in England and Wales is relatively new and the first of its kind in the world.¹²¹ Cooper and Wurtzel¹²² describe the ad hoc nature of provision for defendants in England and Wales who require communication support during the trial and if they give evidence. When an intermediary is available, a defendant with ASD may be assisted to participate effectively in his or her trial; Caraba¹²³ described the case of Michael Piggan, (diagnosed with AS after arrest, who stood trial at the Old Bailey on terrorist charges) and the positive use of intermediaries. A systematic approach involving the setting “ground rules” for the fair treatment of vulnerable defendants in court has been recommended,¹²⁴ and good practice guides are available for advocates planning to use an intermediary and to question a person with autism.¹²⁵

ASD and the Criminal Justice System: Diversion

Browning and Caulfield¹²⁶ highlighted that the criminal justice system's ability to effectively manage individuals with ASD is inconsistent and insufficient. Due to the lack of understanding and knowledge of ASD, individuals with ASD may be perceived as being cold and remorseless recidivists. Therefore, it is important to consider ASD when assessing criminal responsibility.¹²⁷ In order to reduce the risk of jurors' misinterpretations of the defendant's social actions by considering them to be evidence of guilt, introducing the diagnosis of ASD to the jury may help them to understand why the defendant had certain reactions to other witnesses or victims prior to, during or after the crime. It would also help them to understand the defendant's apparent lack of remorse or normal social functioning during courtroom proceedings.¹²⁸ Special contingencies should be considered when sentencing individuals with ASD given that many may be impaired in their ability to express remorse appropriately, which is considered to be a crucial factor in jury and judge deliberations.¹²⁹ Lastly, Raggi et al¹³⁰ argue for directing patients with ASD towards rehabilitation as opposed to incarceration where possible. Although in cases

¹¹⁹ See now *Criminal Procedure Rules 2015* (UK) 3.9(3).

¹²⁰ *Galo v Bombardier Aerospace Ltd* [2016] NICA 25.

¹²¹ P Cooper and D Wurtzel, “Better the Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales, Northern Ireland” (2014) 65 *Legal Quarterly* 39.

¹²² P Cooper and D Wurtzel, “A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales” (2013) 1 *Criminal Law Review* 4.

¹²³ A Caraba, “A View from the Gallery”, *Counsel*, February 2015 <<http://www.counselmagazine.co.uk/articles/view-the-gallery>> (accessed 28 May 2016).

¹²⁴ Cooper, Backen and Marchant, n 99.

¹²⁵ ATC, *The Advocate's Gateway* (London, 2016) <www.theadvocatesgateway.org>.

¹²⁶ Browning and Caulfield, n 10.

¹²⁷ Browning and Caulfield, n 10.

¹²⁸ Freckelton and List, n 30; Foster, n 28; M D Lerner et al, “Emerging Perspectives on Adolescents and Young Adults with High-functioning Autism Spectrum Disorders, Violence, and Criminal Law” (2012) 40 *Journal of the American Academy of Psychiatry and the Law Online* 177.

¹²⁹ Haskins and Silva, n 26.

¹³⁰ C Raggi et al, “Adults with Autism Spectrum Disorder and Learning Disability Presenting with Challenging Behaviour: How Tolerant Should We Be?” (2013) 4 *Journal of Intellectual Disabilities and Offending Behaviour* 42.

where individuals with ASD are diverted into mental-health treatment, there still remains the issue of whether these services are appropriate or effective for this particular group.¹³¹ One study suggested that individuals with ASD were detained as much as two to three years longer compared to individuals with other diagnoses in secure psychiatric settings.¹³²

Cheely et al¹³³ investigated, using records linkage with the Department of Juvenile Justice and the South Carolina Law Enforcement Division and the South Carolina Autism and Developmental Disabilities Monitoring Program (SC ADDM), 609 individuals who were identified as individuals with ASD in the SC ADDM in study years 2000 (n = 155), 2002 (n = 118), 2004 (n = 140) and 2006 (n = 196). All youth were eight years of age at each of these study collection years. The youth were aged between 12 and 18 years at the time of this study. Findings revealed that youths with ASD were more likely to be diverted into pretrial interventions and were also less likely to be prosecuted and charged with probation violations compared to youth without any diagnosis of ASD. Additionally, none of the youths with ASD received a sentence to serve time in a juvenile detention centre in this sample. This is not consistent with the findings of a comparison sample (youths without a diagnosis of ASD) where approximately 5% of charges resulted in detainment. This supports previous studies showing low prevalence rates of confined youth with ASD.¹³⁴ However, Cheely et al¹³⁵ do suggest that some of the youth in their sample may have been considered not to be competent to stand trial and therefore had their case dismissed or were diverted to a mental health service.

Moreover, it is argued that it is important to consider the impact of detainment/imprisonment on an individual with ASD. A relatively modest number of studies investigating the experience of prison on individuals with ASD were identified in a recent review.¹³⁶ The studies identified in this review indicated that inmates with ASD may be at an increased risk of bullying, confrontations, exploitation, anxiety and social isolation as a result of their ASD traits such as obsessions, social naivety and impaired empathy. The vulnerability of an individual with ASD to the change of residence, coupled with situations involving complex social dynamics with other inmates within the prison environment, supports that ASD should be considered when determining whether the offender should be sentenced to prison and for how long.¹³⁷

Future Directions

There is a dearth of knowledge about the use of expert evidence to educate the court about the impact of the defendant's ASD on his or her alleged offending behaviour and on his or her presentation at court. Berryessa¹³⁸ advocates the need for further research investigating expert witnesses in trials involving defendants with hfASD and ASD and the types of evidence provided to judges in these cases. There is also the need for studies investigating how the types of experts or type and quality of information presented on ASDs in trials with defendants with a diagnosis of ASD affects or correlates with case outcomes.¹³⁹ Judicial officers frequently do not have any knowledge of the associated features of ASD in order to enable them to make fair legal decisions concerning defendants with ASD.¹⁴⁰ Consistent with

¹³¹ R L Fazio, C A Pietz and R L Denny, "An Estimate of the Prevalence of Autism Spectrum Disorders in an Incarcerated Population" (2012) 4 *Open Access Journal of Forensic Psychology* 69.

¹³² D J Hare et al, *A Preliminary Study of Individuals with Autistic Spectrum Disorders in Three Special Hospitals in England* (National Autistic Society, 2009).

¹³³ C A Cheely et al, "The Prevalence of Youth with Autism Spectrum Disorders in the Criminal Justice System" (2012) 42 *Journal of Autism and Developmental Disorders* 1856.

¹³⁴ For example, L Brookman-Frazee et al, "Involvement of Youths with Autism Spectrum Disorders or Intellectual Disabilities in Multiple Public Service Systems" (2009) 2 *Journal of Mental Health Research in Intellectual Disabilities* 201.

¹³⁵ Cheely et al, n 134.

¹³⁶ Allely, n 98.

¹³⁷ Freckelton and List, n 30.

¹³⁸ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

¹³⁹ Mayes, n 48.

¹⁴⁰ Freckelton, n 33.

previous recommendations in the literature,¹⁴¹ the study by Berryessa¹⁴² supports the importance and the need for the development and implementation of specially designed training programs for judges and other criminal justice professionals.¹⁴³

Expert witness evidence is recommended to explain the presentation of a defendant with ASD during court proceedings and also to help the jury understand the ways in which their diagnosis (in particular, the specific symptoms of ASD) may have contributed to their offending behaviour. An explanation about the defendant's diagnosis and its contribution to their behaviour may prevent the jury misinterpreting their behaviour and presentation during the trial. Official guidance for advocates on the questioning and treatment of a person ASD in the criminal justice system can be found at theadvocatesgateway.org, an open access website supported by the Inns of Court College of Advocacy (England and Wales). Intermediaries assist vulnerable defendants (including individuals with ASD) to participate effectively in their trials.¹⁴⁴

There are numerous courts in the United States which do not permit psychiatric experts to provide evidence regarding AS or hfASD. These courts which exclude such information claim that any probative value is significantly overshadowed by the fact that bringing in such information would potentially confuse the jury as they try to figure out how the diagnosis may have contributed to the offending behaviour.¹⁴⁵ However, there is clearly great importance in informing the jury of the defendant's diagnosis of ASD in order to help the jury understand their presentation during the court proceedings. If the jury is not provided with any expert testimony regarding the defendant's ASD diagnosis, the jury's negative perception of the defendant's negative demeanour and their lack of remorse may be particularly damaging for the defendant with ASD.¹⁴⁶ It is important to consider a diagnosis of ASD as being a mitigating factor and relevant to prospects of rehabilitation. Specifically, a long sentence may be particularly damaging to individuals with ASD.¹⁴⁷

A diagnosis of ASD can impact on the defendant's mental capacity, criminal responsibility and fitness to plead.¹⁴⁸ To date, there has been no research investigating the cognitive abilities which are important to take into account when assessing the defendant's fitness to plead. Currently, the process for assessing fitness to plead is a full medico-legal assessment. The limitation with this is that much of what is assessed may be irrelevant in terms of legal requirements.¹⁴⁹

Late or missed diagnoses are also problematic; there is no standard screening tool for autism when a suspect enters the criminal justice system. Gary McKinnon was officially diagnosed with AS on 23 August 2008 having been first arrested on 19 March 2002 by the Hi-Tech Crime Unit.¹⁵⁰ In *R v Hayes*,¹⁵¹ the defendant was first arrested in 2012 but only diagnosed with AS on 2015 less than one month before his trial began. It is crucial that the accused person who may have ASD is assessed as early as possible in the criminal justice process.

¹⁴¹ Browning and Caulfield, n 10.

¹⁴² Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56. See also more recently K Maras et al, "Autism in the Courtroom: Experiences of Legal Professionals and the Autism Community" (2017) 47 *J Autism Dev Disord* 2610.

¹⁴³ Browning and Caulfield, n 10; Freckelton, n 33; Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

¹⁴⁴ Cooper and Wurtzel, n 122. See also P Cooper and M Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model" (2017) 21 *The International Journal of Evidence and Proof* 351.

¹⁴⁵ For example, *Minnesota v Anderson* 789 NW 2d 227, 235 (Minn, 2010); Foster, n 28.

¹⁴⁶ Haskins and Silva, n 26; Cea, n 39.

¹⁴⁷ Cea, n 39; Allely, n 98; Lewis et al, n 98; Newman, Cashin and Waters, n 98; Robertson and McGillivray, n 98.

¹⁴⁸ T P Berney, "Asperger Syndrome from Childhood into Adulthood" (2004) 10 *Advances in Psychiatric Treatment* 341

¹⁴⁹ R J Brewer, G M Davies and N J Blackwood, "Fitness to Plead: The Impact of Autism Spectrum Disorder" (2016) 16 *Journal of Forensic Psychology Practice* 182.

¹⁵⁰ J Sharp, *Saving Gary McKinnon: A Mother's Story* (Biteback Publishing, 2013).

¹⁵¹ *R v Hayes* [2015] EWCA Crim 1944.

There are at least seven-key stages within the criminal justice process where the defendant with ASD is at risk of unfair treatment; being interviewed as a suspect; being assessed as fit to plead/stand trial; appearing before the fact-finders at trial; when following the evidence in the trial and giving instructions to lawyers; giving evidence and being cross-examined; being evaluated by the fact-finders when they are considering their verdict; and being sentenced if found guilty. Therefore, the earlier the defendant's ASD is identified the better to ensure a fair trial for the defendant with ASD.

In at least one of these areas, there is the prospect of reform in England and Wales. In January 2016, the Law Commission published the "Unfitness to Plead" report in addition to the draft legislation in an accompanying report which outlined a new test for unfitness to plead and stand trial. Parliament it yet to make revisions to the current test which the "Unfitness to Plead" report highlighted "requires updating and is not consistently understood or applied".¹⁵² A study published in 2016 indicated that the new fitness to plead measure recommended by the Law Commission "has promise of significant clinical and legal applications" for defendants with ASD.¹⁵³

CONCLUSION

AS or ASD presents as a challenge at the trial and sentencing stage.¹⁵⁴ The study by Berryessa et al¹⁵⁵ provides the first investigation into the way that potential jurors understand and legally process defendants with hfASD or ASD. Overall the potential jury respondents in their study did not hold the opinion that a diagnosis of hfASD should impact on the legal responsibility of a defendant. However, they did believe that a diagnosis of ASD should be considered as a mitigating factor for moral culpability and legal consequences. Most importantly, the findings from this study also revealed that there is a lack of consensus on these issues which highlights the need for further research in this area.¹⁵⁶ Previous literature has argued that it is "reasonable to consider some AS sufferers not criminally responsible for their actions and unfit to stand trial".¹⁵⁷ Currently, ASD is not considered an affirmative defence and it has been considered whether it should be one.¹⁵⁸ However, there are significant challenges with implementing ASD as a defence because this disorder is a spectrum.¹⁵⁹ Given the relatively few findings to date, it is recommended by Berryessa¹⁶⁰ that each case involving a defendant with an hfASD or ASD diagnosis should be evaluated on a case-by-case basis. This would enable the assessment of the specific offending behaviour and disorder of the defendant and how these may be relevant to their mental capacity and culpability.¹⁶¹

The authors recommend an analysis of case files where the defendant had a diagnosis of ASD in order to compare charges, pleas entered, procedural adjustments at court, instructions to expert witnesses, evidence adduced about the defendant's condition, directions to juries, judicial remarks on the evidence (eg summing-up for the jury), verdicts and sentencing. In addition, replicating the studies of Berryessa in other jurisdictions would enable a comparison of approaches and attitudes. Currently, it is unclear what principles, if any, underpin jurors' and judges' evaluation of defendants with ASD or the impact of a defendant's ASD on sentencing.

¹⁵² The Law Commission, *Unfitness to Plead Volume 1*, LAW COM No 364 (Law Commission, London, 2016). Available at <http://www.lawcom.gov.uk/wp-content/uploads/2016/01/lc364_unfitness_vol-1.pdf>.

¹⁵³ Brewer, Davies and Blackwood, n 150.

¹⁵⁴ Freckelton and List, n 30.

¹⁵⁵ Berryessa et al, n 56.

¹⁵⁶ Berryessa et al, n 56.

¹⁵⁷ N Katz and Z Zemishlany, "Criminal Responsibility in Asperger's Syndrome" (2006) 43 *The Israel Journal of Psychiatry and Related Sciences* 166, 166.

¹⁵⁸ Cea, n 39.

¹⁵⁹ Cea, n 39.

¹⁶⁰ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.

¹⁶¹ Berryessa, "Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism", n 56.